# STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 2002B035

### INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOAN M. GEORGE,

Complainant,

VS.

DEPARTMENT OF REVENUE, HEARING SECTION, ENFORCEMENT GROUP,

Respondent.

This matter was heard on December 12, 2001, and March 4, 2002, by Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Andrew Katarikawe, Assistant Attorney General. Complainant appeared in-person and was represented by Michael O'Malley, Attorney at Law.

#### **MATTER APPEALED**

Complainant appeals the disciplinary termination of her employment on October 24, 2001. For the reasons set forth below, respondent's action is affirmed.

# **ISSUE**

Whether respondent's action was arbitrary, capricious or contrary to rule or law.

1

2002B035

#### FINDINGS OF FACT

The Administrative Law Judge has considered the exhibits and the testimony, assessed the credibility of the witnesses and makes the following findings of fact, which were established by a preponderance of the evidence.

- Joan M. George, complainant, worked in the Hearing Section of the Department of Revenue (DOR), respondent, for a little over ten years.
  As an Administrative Assistant II, she checked in customers as they arrived for driver's license hearings, answered the telephone, and processed mail.
- 2. On February 28, 1995, complainant received a written reprimand for providing erroneous information to a telephone caller and exceeding her authority by determining that certain suspension notices were improper. The reprimand included an admonition against currying favor with attorneys and others who did business with the Hearing Section.
- 3. On September 9, 1998, complainant was issued a one-year corrective action for altering a motor vehicle record by using the name and hearing officer number of the division's director and then denying that she did so. The corrective action included a warning that acting on behalf of any party to a hearing or withholding the truth about such matters would result in disciplinary action.
- 4. On October 20, 1998, a personnel documentation was placed in complainant's personnel file documenting an incident of a party to a hearing implying that complainant might do a favor for him that no one else in the division would.

- 5. On September 15, 1999, complainant received written notice that the September 9, 1998 corrective action had expired, but that her job performance still was not satisfactory, particularly in the areas of interacting with attorneys and providing complete and truthful answers when questions were posed to her.
- 6. On October 10, 1999, complainant was given a memo explicating that she must eliminate any appearance of impropriety by ceasing to provide assistance to her daughter, who worked for a law firm that had regular dealings with the Hearing Section.
- 7. On February 14, 2000, complainant was given a written warning to correct her behavior of improperly processing subpoenas lest other corrective measures become necessary.
- 8. On February 22, 2000, complainant was issued a six-month corrective action for substandard job performance, the result of a high volume and large magnitude of errors.
- 9. On April 11, 2000, complainant was issued a six-month corrective action for approving additional terms for a probationary driver's license by signing the name of a hearing officer, after the hearing officer had denied the request for additional terms.
- 10. On June 29, 2000, complainant was issued a two-day disciplinary suspension for signing a probationary license authorization with the name of a hearing officer.
- 11. On March 1, 2001, Hearings Division Director Kenneth Wynkoop sent an e-mail to all staff advising them that, due to recent federal and state legislation protecting privacy interests, no personal driver information

could be provided to an outside party without the written consent of the driver.

- 12. On September 7, 2001, complainant was directed in writing to telephone each attorney or police officer who had purchased popcorn from her for a school benefit and return the money that she had received from them. She was further instructed to not again solicit sales from attorneys, police officers, or hearing respondents who appeared before the division because of the appearance of impropriety.
- 13. On September 10, 2001, complainant was given a written warning by her supervisor about having been dishonest in compiling a complete list of attorneys who had purchased popcorn from her.
- 14. It is the policy of the Hearing Section to not fax records, for reasons of privacy. The only exception is if the record has a pending case number, meaning that a case is pending before the Hearing Section.
- 15. A faxed record must be stamped as a hearing exhibit and be only for hearing use. A note must be made in the computer indicating who faxed the record and why.
- 16. On Friday, September 28, 2001, Cynthia Hamby, a program assistant, found a driving record without a cover sheet on the fax machine. The record was not stamped as an exhibit and was not from a pending case; it did not display a case number. She could not tell why the record had been faxed; there was no related entry in the computer.

- 17. Hamby showed the record to Kathleen Beesing, Assistant Chief Hearing Officer and the office supervisor, who directed her to try to find out who faxed it and why the office policy was not followed.
- 18. Hamby presented the record to complainant and another person, each of whom denied faxing it.
- 19. After complainant had departed for the day, Beesing noticed that a name had been scratched out on complainant's telephone log.
- 20. On Monday morning, October 1, 2001, Beesing looked at the original record and it was apparent to her that the name that had been scratched out on complainant's log was the same as the name on the record.
- 21. Beesing called complainant into her office and asked about the name that was scratched out. Complainant answered that it was nothing, just doodles, and denied seeing the fax.
- 22. After being questioned, complainant eventually admitted faxing the record to an attorney because the citation had been recorded incorrectly. She stated to Beesing that she was not aware that she should not fax the record and did not realize that she should make a corresponding computer entry. She admitted that the scribbling on her log was related to the fax.
- 23. Wynkoop, the division director and appointing authority, was out of the office on October 1 and 2. When he returned on October 3, he found a memo from Beesing detailing the events surrounding complainant and the fax. He was especially disturbed at complainant's attempt to cover up the incident.

- 24. After reviewing complainant's personnel file and finding three written reprimands, three corrective actions and a disciplinary action, Wynkoop set up a predisciplinary meeting for October 10.
- 25. At the R-6-10 meeting, complainant admitted her error concerning the fax. Wynkoop was most concerned about complainant having scribbled out a name on her telephone log and not making a computer entry, which had the effect of there being no record of the faxed document being sent. The division's policy had always been not to have contact with anyone without making a note of it.
- 26. In arriving at his termination decision, Wynkoop reflected upon complainant's background of being less than truthful or candid. To him, the lying was worse than the actions themselves. He took into account complainant's poor work history and performance documentation, particularly the prior disciplinary action, having warned her that the two-day suspension would be "the last straw."
- 27. By letter dated October 19, 2001, the appointing authority terminated complainant's employment effective October 24, 2001, for failure to perform competently, willful misconduct, and violation of agency policy, based upon the September 28, 2001 incident in which she improperly faxed a driver's record to an attorney and then denied it when confronted.
- 28. Joan M. George filed a timely appeal of her dismissal on October 29, 2001.

## **DISCUSSION**

١.

In a disciplinary proceeding, in this case termination of employment, the burden of proof by a preponderance of the evidence rests with the respondent to show that there was just cause for the discipline imposed. See Department of Institutions v. Kinchen, 886 P. 2d 700 (Colo. 1994) (explaining role of state personnel system in employee discipline actions). The Board may reverse respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. §24-50-103(6), C.R.S. In determining whether the agency's decision was arbitrary or capricious, it must be determined whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. Wildwood Child & Adult Care Program, Inc. v. Colorado Department of Public Health & Environment, 985 P. 2d 654 (Colo. App. 1999).

II.

An appointing authority has the power to hire employees and evaluate job performance and to administer corrective and disciplinary actions. Rule R-1-6, 4 CCR 801. In the present matter, complainant was given ample notice of her job deficiencies and opportunity to correct her performance or behavior. The agency followed the concept of progressive discipline. See Rule R-6-2, 4 CCR 801. The appointing authority did not abuse his discretion. See Rules R-6-5, R-6-6, R-6-8, R-6-9, R-6-10, R-6-11, and R-6-12, 4 CCR 801.

Under these circumstances, respondent's action was not arbitrary, capricious or contrary to rule or law. Through credible evidence, respondent proved by a

preponderance of the evidence that there was just cause for the termination of complainant's employment. See Kinchen, supra.

III.

Section 24-50-125.5, C.R.S., provides that an award of attorney fees and costs is mandatory if it is found that the personnel action from which the proceeding arose was instituted or defended "frivolously, in bad faith, maliciously or as a means of harassment or was otherwise groundless." This record does not support any of those findings. Accordingly, this is not a proper case for a fee award. See Rule R-8-38, 4 CCR 801.

## **CONCLUSIONS OF LAW**

- 1. Respondent's action of terminating complainant's employment was not arbitrary, capricious or contrary to rule or law.
- 2. Neither party is entitled to an award of attorney fees and costs.

### ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this \_\_\_\_ day of April, 2002, at Denver, Colorado.

Robert W. Thompson, Jr. Administrative Law Judge

### NOTICE OF APPEAL RIGHTS

### EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- 2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

# PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

### RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

# BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

# **ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

#### CERTIFICATE OF SERVICE

This is to certify that on the \_\_\_\_ day of April, 2002, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Michael O'Malley Attorney at Law 1444 Stuart Street Denver, CO 80204

And through interagency mail, to:

Andrew Katarikawe Assistant Attorney General Employment Section 1525 Sherman Street, 5<sup>th</sup> Floor Denver, CO 80203